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Chew Yew Yek v Ambank (M) Bhd and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-03(IM)-20–03 OF 2018 AND B-02(A)-456–03 OF 2018
ABDUL RAHMAN SEBLI, MARY LIM AND HASNAH HASHIM JJCA
27 AUGUST 2019

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Civil Procedure — Assessment of damages — Appeals — Notice for directions for assessment of damages — Application for leave to discontinue the originating summons — Originating summons withdrawn by way of consent order — Whether court retained jurisdiction to proceed with assessment of damages when main suit had ceased to exist and was no longer before court to whom undertaking for damages was given

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This judgment was in relation to two appeals whereby the first appeal was against the decision of the High Court in dismissing the preliminary objection raised by the appellant against the notice of assessment of damages filed by the respondent. The parties in the present case agreed that the second appeal was

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dependent on the outcome of the first appeal. The appellant was the successful bidder of a piece of land situated in Gombak, Selangor ('the land') which was put up for sale in the public auction conducted by the respondent. Pursuant to the successful bid, a memorandum of sale ('the MOS') was executed on 22 March 2016 whereby the appellant had paid 10% of the purchase price.

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Problem arose when the appellant failed to pay the balance sum RM171m within the stipulated time. Consequently, the appellant filed an originating summons ('the OS') seeking, inter alia, an application for extension of time. Pending the disposal of the OS, the appellant filed an application for an ex parte injunction to restrain the respondent from terminating the MOS. An ad

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interim injunction was granted to the appellant with an undertaking of damages. Subsequently, on 28 October 2016, the court dismissed the injunction with damages to be assessed. Pending the hearing of the assessment of damages, the appellant filed an action for leave to discontinue the OS pursuant to O 21 r 3 of the Rules of Court 2012. The OS was then withdrawn

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by way of consent order and was recorded as being struck out with no liberty to file afresh. On the date of the hearing of the assessment for damages, the appellant raised a preliminary objection that the assessment of damages had abated by reason of the fact that the action had been struck out. The preliminary objection was dismissed by the learned senior assistant registrar

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('the SAR') and the decision was affirmed by the High Court judge. The issue raised in the present appeal was whether the assessment of damages pursuant to an undertaking given to the court could still be proceeded with after the originating summons being the main suit had been discontinued and struck out with no liberty to file afresh.

Held, allowing the appellant's appeal with costs, setting aside the decision of the High Court and striking out the second appeal with costs following the appellant's withdrawal of the appeal

(1) Since there was no stipulation in the consent order that the respondent reserved the right to proceed with the assessment of damages, all proceedings in respect of the originating summons came to an end and with it goes the undertaking and thereby the assessment of any damage (see para 18).

(2) The court was unable to accede to the respondent's argument that the assessment of damages survived the discontinuance of the action. That right out to have been reserved in the consent order if in fact the respondent intended it to be reserved (see para 19).

(3) The respondent was clearly in an advantageous position vis a vis the appellant in relation to the pending assessment of damages, yet it chose not to, when entering into a consent order, reserve the right to proceed with the assessment. The court must be guided by what was written in the consent order. It cannot be open to the parties to stipulate additional terms (see paras 20–21).

(4) Since there was no term in the consent order to reserve the respondent's right to proceed with the assessment of damages and the court was bereft of jurisdiction once the consent order had been perfected, the question of proceeding with the assessment of damages did not arise (see para 23).

[Bahasa Malaysia summary

Penghakiman ini adalah berkaitan dengan dua rayuan di mana rayuan pertama adalah terhadap keputusan Mahkamah Tinggi dalam menolak bantahan awal yang dibangkitkan oleh perayu terhadap notis penilaian kerugian yang difailkan oleh responden. Pihak-pihak di dalam kes ini bersetuju bahawa rayuan kedua adalah bergantung pada hasil rayuan pertama. Perayu adalah pembida berjaya satu tanah yang terletak di Gombak, Selangor ('tanah tersebut') yang diiklankan untuk jualan di lelongan awam yang dijalankan oleh responden. Menurut kepada bidaan yang berjaya, satu memorandum jualan ('MJ tersebut') dimasuki pada 22 Mac 2016 di mana perayu telah membayar 10% daripada harga jualan. Masalah timbul apabila perayu gagal untuk membayar baki jumlah RM171 juta dalam masa yang ditetapkan. Akibatnya, perayu kini memfailkan saman pemula ('saman pemula tersebut') meminta, antara lainnya, satu permohonan perlanjutan masa. Sementara pelupusan saman pemula tersebut, perayu memfailkan permohonan injunksi ex parte untuk menghalang responden daripada menamatkan MJ tersebut. Satu injuksi ad interim diberikan kepada perayu dengan aku janji kerugian. Selepas itu, pada 28 Oktober 2016, mahkamah menolak injunksi dengan kerugian yang akan dinilaikan. Sementara pendengaran penilaian kerugian, perayu memfailkan satu tindakan untuk kebenaran tidak menyambung saman

A pemula menurut A 21 k 3 Kaedah-Kaedah Mahkamah 2012. Saman pemula kemudiannya ditarik balik dengan cara penghakiman persetujuan dan direkodkan sebagai dibatalkan tanpa kebebasan untuk pemfailan semula. Pada tarikh pendengaran penilaian kerugian itu, perayu membangkitkan bantahan awal bahawa penilaian kerugian telah reda kerana tindakan telah dibatalkan.
B Bantahan awal telah ditolak oleh penolong kanan yang berdaftar ('PKB') dan keputusan telah ditegaskan oleh hakim Mahkamah Tinggi. Isu yang dibangkitkan di dalam rayuan kini adalah sama ada penilaian kerugian menurut akujanji yang diberikan oleh mahkamah masih boleh dijalankan
C dengan saman pemula sebagai saman utama telah diberhentikan dan dibatalkan tanpa kebebasan untuk pemfailan semula.

Diputuskan, membenarkan rayuan perayu dengan kos, mengenetepikan keputusan Mahkamah Tinggi dan membatalkan rayuan kedua dengan kos
D menurut penarikan rayuan oleh perayu.

(1) Memandangkan tiada ketetapan di dalam penghakiman persetujuan bahawa responden merizabkan haknya untuk meneruskan penilaian kerugian, semua prosiding mengenai saman pemula berakhir dan juga aku janji dan seterusnya penilaian kerugian (lihat perenggan 18).

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(2) Mahkamah tidak dapat menerima hujahan responden bahawa penilaian kerugian boleh masih berjalan walaupun tindakan telah diberhentikan. Hak itu telah dirizabkan di dalam penghakiman persetujuan jika benar responden berniat untuk merizabkannya (lihat perenggan 19).

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(3) Responden dengan jelas di dalam posisi yang menguntungkan *vis a vis* perayu berkaitan dengan penilaian kerugian yang masih belum selesai, tetapi memilih untuk tidak berbuat sedemikian, apabila memasuki penghakiman persetujuan, merizabkan haknya untuk meneruskan
G dengan penilaian. Mahkamah mestilah dipandu dengan apa yang tertulis di dalam penghakiman persetujuan. Ia tidak boleh terbuka kepada pihak-pihak untuk menetapkan terma-terma tambahan (lihat perenggan 20–21).

H (4) Memandangkan tiada terma di dalam penghakiman persetujuan untuk merizabkan hak responden untuk meneruskan dengan penilaian kerugian dan mahkamah tidak mempunyai bidang kuasa apabila penghakiman persetujuan telah disempurnakan, persoalan prosiding penilaian kerugian tidak berbangkit (lihat perenggan 23).]

I **Notes**

For cases on appeals, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2268–2269.

Cases referred to

Abdul Razak bin Sheikh Mahmood & Ors v Amanah Raya Bhd & Ors and another appeal [2018] 5 MLJ 125; [2018] 5 CLJ 273, CA (refd)

Goh Cheng Kum & Anor v Acepoint Venture Sdn Bhd & Ors (Civil Suit No 22-NCVC-78–01 of 2012) (unreported), HC (refd)

Legislation referred to

Rules of Court 2012 O 21 r 3, O 42 r 13

Appeal from: Originating Summons No BA-24–687–07 of 2016 (High Court, Shah Alam)

M David Morais (Simon Hong and Raul Lee Bhaskaran with him) (Simon Hong) for the appellant.

Vijay Kumar Natarajan (Diana Chee with him) (Natarajan) for the respondent.

Abdul Rahman Sebli JCA (delivering judgment of the court):

[1] The first of the two appeals was against the decision of the High Court dismissing the preliminary objection raised by the appellant against the notice for assessment of damages filed by the respondent bank.

[2] The facts as set out by learned counsel for the respondent in his written submissions are not in dispute and they are as follows, with the necessary modifications. The appellant was the successful bidder of a piece of land held under PN89881, Lot 72916, Bandar Baru Selayang, Daerah Gombak, Selangor (formerly known as HS(D) 20034, No PT26549, Mukim Batu, Daerah Gombak, Selangor) ('the land') which was put up for sale in the public auction conducted by the respondent pursuant to the charge to the land.

[3] The registered owner of the land was a company known as SAP Holdings Sdn Bhd ('SAP'). In 1992, SAP entered into a joint venture agreement to develop the land with a company called Cergas Tegas Sdn Bhd ('Cergas Tegas'). The respondent had extended a bridging loan facility to Cergas Tegas for which the land was put up as security. A charge was thereafter executed over the land in favour of the respondent.

[4] Cergas Tegas defaulted on the loan repayments. This prompted the respondent to exercise its statutory rights under the charge to initiate foreclosure proceedings against Cergas Tegas to sell the land by way of a public auction. An order for sale of the land was granted to the respondent on 20 December 2010.

[5] In the public auction that was conducted on 22 March 2016, the

appellant successfully bade to purchase the land at the price of RM190m. Pursuant to the successful bid, a memorandum of sale was executed on the date of the auction. The appellant being the successful bidder paid a total sum of RM19m, being 10% of the purchase price. The balance of RM171m ought to be paid by the appellant within 120 days from the date of the auction. The 120 days would lapse on 20 July 2016.

[6] The appellant failed to pay the balance sum of RM171m by 20 July 2016 and filed an originating summons seeking various reliefs which included an application for extension of time to pay the sum. The matter went right up to the Federal Court and was dismissed.

[7] Pending the disposal of the originating summons, the appellant filed for an ex parte injunction to restrain the respondent from terminating the memorandum of sale dated 22 March 2016.

[8] On 15 August 2016, an ad interim injunction was granted to the appellant with an undertaking of damages, which caused the respondent to abort the scheduled auction on 16 August 2016.

[9] On 28 October 2016, the court dismissed the injunction with damages to be assessed. The respondent then proceeded to file a notice for directions for assessment of damages. The learned senior assistant registrar ('SAR') gave the necessary directions and fixed hearing on 10 March 2017.

[10] In the meantime, on 18 January 2017 the appellant filed another application, this time for leave to discontinue the originating summons pursuant to O 21 r 3 of the Rules of Court 2012 ('the Rules'). This order provides as follows:

> 3(1) Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.
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> (2) An application for leave under this rule shall be made by a notice of application.

[11] The rationale behind this provision is that when the action has reached a certain stage, the plaintiff is not allowed to avoid the contest and slip out through the back door by discontinuing the action. Leave will not be granted if it would cause injustice to the defendant and the defendant must not be deprived of any advantage he has gained: see the judgment of Vazeer Alam

Mydin Meera J (now JCA) in *Goh Cheng Kum & Anor v Acepoint Venture Sdn Bhd & Ors* (Civil Suit No 22-NCVC-78–01 of 2012) (unreported).

[12] The originating summons was withdrawn by way of a consent order and was recorded as being struck out with no liberty to file afresh. We reproduce below the full terms of the consent order:

(i) Leave is granted to the Plaintiff to discontinue the action herein without liberty to file afresh and without prejudice to the parties' rights to address the effect of this Order in Kuala Lumpur High Court, Civil Suit No WA-22NCVC-835-12/2016 ('Writ Action'), including but not limited to the right of both parties to argue whether the Writ Action constitutes a fresh action;

(ii) Originating Summons (Enclosure 2) is struck out;

(iii) Costs of RM20,000.00 to be paid by the Plaintiff to the 1st Defendant; and

(iv) No order as to costs between the Plaintiff and the 2nd Defendant.

[13] When the assessment for damages was called for hearing before the learned SAR, the appellant raised a preliminary objection that the assessment of damages had abated by reason of the fact that the action had been struck out. The preliminary objection was dismissed by the learned SAR on 9 May 2017.

[14] Dissatisfied with the learned SAR's decision, the appellant filed an appeal to the judge in chambers. On 29 January 2018, the learned judge affirmed the learned SAR's decision. It was held by Her Ladyship that as the consent order did not expressly refer to the pending assessment of damages, and as the undertaking subsisted independently of the main action, the discontinuance of the main action did not discontinue the assessment of damages on the undertaking.

[15] The simple issue before us was whether the assessment of damages pursuant to an undertaking given to the court could still be proceeded with after the originating summons had been discontinued and struck out with no liberty to file afresh. In other words, the question was whether the court retains the jurisdiction to proceed with the assessment of damages when the main suit had ceased to exist and was no longer before the court to whom the undertaking for damages was given.

[16] It was the respondent's contention that the appeal should be dismissed and defended the following pronouncements by the learned judge:

[26] The court also finds that the plaintiff's objection against the assessment of damages proceedings under the same suit totally and utterly unjustifiable. The

A discontinuance of the main suit does not negate the undertaking for damages. It is utterly preposterous that mere discontinuance or withdrawal of action would tantamount to a relinquishment of liability to pay damages. There is no law or precedent to that effect.

B [27] The fact remains that the first defendant's right for an inquiry to be carried out to assess its damages (suffered from the plaintiff's ad interim injunction) ought to be maintained considering the plaintiff's unequivocal and clear undertaking of damages which was then translated into this court's order dated 15 August 2016.

C **[17]** The appellant's argument on the other hand was that as the discontinuance of the action was made by a consent order issued under O 21 r 3 of the Rules without any reservation or stipulation on the pending assessment of damages, the respondent was prohibited from proceeding with the assessment which must also be deemed to have been struck out.

D **[18]** We were inclined to agree with the appellant. Since there was no stipulation in the consent order that the respondent reserved the right to proceed with the assessment of damages, all proceedings in respect of the originating summons came to an end and with it goes the undertaking and E thereby the assessment of any damage.

[19] We were unable accede to the respondent's argument that the assessment of damages survives the discontinuance of the action. That right ought to have been reserved in the consent order if in fact the respondent F intended it to be reserved. The following passage in *The Supreme Court Practice 1997(1)* at p 379 is on point:

> The term 'discontinuance' appears to be directed to the final termination of the whole action or counterclaim, so that no part of it survives an effective discontinuance;

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[20] The respondent was clearly in an advantageous position vis a vis the appellant in relation to the pending assessment of damages, yet it chose not to, when entering into the consent order, reserve the right to proceed with the H assessment.

[21] The court must be guided by what is written in the consent order. It cannot be open to the parties to stipulate additional terms. If indeed the intention of the parties was to reserve the right to continue with the assessment I of damages, the proper course would have been to apply to set aside the consent order on the ground of mistake or for a rectification of the order. Order O 42 r 13 of the Rules is relevant and provides as follows:

> Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, a party intending to set

aside or vary such order or judgment shall make an application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

[22] In *Abdul Razak bin Sheikh Mahmood & Ors v Amanah Raya Bhd & Ors and another appeal* [2018] 5 MLJ 125; [2018] 5 CLJ 273 this court in the judgment delivered by David Wong Dak Wah JCA (now CJ (Sabah and Sarawak)) held as follows at para 20:

> The law on setting aside consent judgment is more than settled and it is this. A consent judgment is only recorded when the respective litigants had agreed in writing as to how to resolve a legal suit. Once the consent judgment had been perfected, the parties are bound by it and the court is duty-bound to enforce the agreed terms of the same. The court also cannot vary any of the agreed terms unless with the mutual consent of the parties. Hence, one can say that the court is functus officio or in other words, the court is bereft of jurisdiction to entertain any request to set aside such judgment.

[23] Since there is no term in the consent order to reserve the respondent's right to proceed with assessment of damages and the court is bereft of jurisdiction once the consent order had been perfected, the question of proceeding with the assessment of damages does not arise.

[24] It was for all the reasons aforesaid that we allowed the appellant's appeal with costs and set aside the decision of the High Court. As a consequence of our decision, and as agreed by the parties, that the second appeal is dependent on the outcome of the first appeal, the second appeal is struck out with costs following the appellant's withdrawal of the appeal.

Appeal allowed with costs; decision of High Court set aside; second appeal struck out with costs following appellant's withdrawal of the appeal.

Reported by Addibah Adnan